GT Rajan v Lee Yoke Lay & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-2-1992
WAN MOHAMED, ABDUL MALEK AND JAMES FOONG JJ
19 APRIL 1994

Legal Profession *— Professional discipline — Conduct unbefitting — Whether solicitor who acts as stakeholder is under a duty to account for interest earned on moneys held by him as stakeholder — Legal Profession Act 1976 s 93(2)*

Legal Profession *— Liability as fiduciary — Whether solicitor was agent of his client — Whether solicitor's role changes when he acts as stakeholder — Whether solicitor acts as trustee to both parties — Legal Profession Act 1976*

Legal Profession *— Duty to client — Conveyancing practice — Memorandum of transfer — Whether solicitor should have forwarded memorandum of transfer for adjudication immediately after execution of sale and purchase agreement — Whether solicitor guilty of delay*

The appellant, GT Rajan ('Rajan'), had acted as the respondents' solicitor in a sale and purchase transaction in which the respondents sold a piece of land to two purchasers. The sale and purchase agreement ('the agreement') provided that Rajan was to forthwith present the memorandum of transfer for adjudication after it was executed by the purchasers or their nominees and that Rajan was to hold the balance purchase price of RM750,000 until the memorandum of transfer was registered in favour of the purchasers.

However, Rajan only forwarded the memorandum of transfer for adjudication and stamping after the balance purchase price was paid, which caused a delay of four months before the respondents received the money. When the balance purchase price was paid by the purchasers to Rajan, the respondents requested that the amount be deposited into a fixed deposit interest earning account. Rajan was of the view that as he was a stakeholder of the money, he need not accede to the respondents' request. Eventually when the balance of the purchase price was released to the respondents some four months later, it was without any interest. This prompted the respondents to complain to the State Bar Committee about the conduct of Rajan which resulted in an enquiry by the Disciplinary Committee under s 99 of the Legal Profession Act 1976 before its amendment in 1992. The issues before the Disciplinary Committee were, inter alia: (1) whether Rajan was a solicitor for the respondents or a stakeholder; and (2) whether Rajan was late in sending the memorandum of transfer for adjudication and stamping. The Disciplinary Committee answered both questions in the affirmative and found Rajan guilty of 'conduct otherwise unbefitting an advocate and solicitor' under s 93(2)(b) of the Legal Profession Act 1976 before its amendment in 1992. Rajan appealed against that decision.

Held, allowing the appeal:

(1) It is without doubt that Rajan first acted as a solicitor for the respondents. In that capacity, he was an agent of the respondents. However, when the agreement was executed, Rajan's role as an agent was transformed. The provision that Rajan shall receive the balance purchase price and not release the same until the registration of the transfer in the names of the purchasers or their nominees placed a responsibility on Rajan to keep the money in his own hands or to put it on deposit with a bank. In the event that registration of the transfer could not be registered, he had to return the money to the purchasers. On the other hand, without the money being placed with him, the respondents would have refused to allow the release of the document of title and the memorandum of transfer to the purchasers. Rajan was therefore placed in the position of a trustee where he was accountable to both the purchasers and the respondents and in order to protect both their interests, Rajan was clearly a stakeholder.

(2) From decided authorities, it is clear that if a person is a stakeholder then he is not accountable to any party for any interest gained while holding the money on trust. As Rajan was a stakeholder of the balance purchase price, he was entitled to keep for himself any interest earned on the sum. Based on the aforesaid, the Disciplinary Committee had erred in fact and in law in arriving at their finding on the first question.

(3) It was not disputed that the memorandum of transfer was executed by the purchasers' nominees only after the balance of the purchase price was received. Under normal conveyancing practice, a memorandum of transfer is not forwarded for adjudication and stamping until and unless all required particulars of the purchase are completed and the purchaser has executed the same. Any memorandum of transfer which does not fulfil this requirement is considered incomplete and is likely of being rejected by the relevant authorities. Under such circumstances, Rajan could not possibly have forwarded the memorandum of transfer for adjudication immediately after execution of the agreement as the memorandum had first to be signed by the parties and he could not be blamed for sending the memorandum of transfer late for adjudication and stamping. The Disciplinary Committee had therefore erred in arriving at their conclusion on the second question.

[Bahasa Malaysia summary

Perayu, GT Rajan ('Rajan'), telah bertindak sebagai peguamcara responden untuk suatu transaksi jualbeli di mana responden telah menjual sebidang tanah kepada dua pembeli. Perjanjian jualbeli itu ('perjanjian itu') memperuntukkan bahawa Rajan mesti menyerahkan memorandum pindahmilik dengan segera untuk pembatalan setem (adjudication) selepas ianya disempurnakan oleh pembeli atau penerima namaan mereka dan bahawa Rajan mesti memegang baki

harga belian sebanyak RM750,000 sehingga memorandum pindahmilik didaftar di dalam nama pembeli.

Bagaimanapun, Rajan hanya menghantar memorandum pindahmilik itu untuk pembatalan setem dan untuk disetemkan selepas baki harga belian dibayar, yang telah mengakibatkan suatu kelewatan selama empat bulan sebelum responden menerima wang mereka. Apabila baki harga belian telah dibayar oleh pembeli kepada Rajan, responden telah meminta supaya jumlah wang itu disimpan di dalam suatu akaun simpanan tetap yang menghasilkan faedah. Rajan berpendapat bahawa oleh kerana beliau merupakan pemegang amanah harta (stakeholder) wang itu, beliau tidak perlu mengikut permintaan responden. Kesudahannya, apabila baki harga belian telah diberikan kepada responden lebih kurang empat bulan kemudian, ia telah diberikan tanpa faedah. Ini menyebabkan responden membuat aduan kepada Jawatankuasa Peguam Negeri mengenai kelakuan Rajan yang mengakibatkan suatu siasatan diadakan oleh Jawatankuasa Tatatertib di bawah s 99 Akta Profesyen Undang-Undang 1976 sebelum pindaannya pada tahun 1992. Isu-isu di hadapan Jawatankuasa Tatatertib adalah, antara lain: (1) sama ada Rajan merupakan peguamcara bagi pihak responden ataupun seorang pemegang amanah harta; dan (2) sama ada Rajan lambat menghantar memorandum pindahmilik itu untuk pembatalan setem dan untuk disetemkan. Jawatankuasa Tatatertib telah menjawab mengiakan kedua-dua soalan itu dan mendapat bahwa Rajan bersalah kerana 'kelakuan selainnya yang tidak wajar untuk seorang peguamcara dan peguambela' ('conduct otherwise unbefitting an advocate and solicitor') di bawah s 93(2)(b) Akta Profesyen Undang-Undang 1976 sebelum pindaannya pada tahun 1992. Rajan telah membuat rayuan terhadap keputusan itu.

Diputuskan, membenarkan rayuan itu:

(1) Tidak boleh diragukan bahawa Rajan pada mulanya telah bertindak sebagai seorang peguamcara bagi pihak responden. Sebagai peguamcara bagi pihak responden, beliau merupakan seorang agen bagi mereka. Bagaimanapun, apabila perjanjian itu disempurnakan, peranan Rajan sebagai seorang agen telah bertukar. Peruntukan bahawa Rajan mesti menerima baki harga belian dan tidak melepaskan wang itu sehingga pendaftaran pindahmilik itu di dalam nama pembeli atau penerima namaan mereka meletakkan tanggungjawab di atas Rajan untuk menyimpan wang itu di dalam tangannya sendiri atau dengan sebuah bank. Jikalau pendaftaran pindahmilik itu tidak dapat didaftarkan, beliau mesti memulangkan wang itu kepada pembeli. Sebaliknya, tanpa wang itu diletakkan dengannya, responden tentu enggan membenarkan pelepasan dokumen hakmilik dan memorandum pindahmilik kepada pembeli. Oleh itu, Rajan terletak di dalam kedudukan seorang pemegang amanah di mana beliau bertanggungjawab kepada kedua-dua pembeli dan responden dan untuk melindungi kepentingan kedua-dua mereka, Rajan jelas merupakan seorang pemegang amanah harta.

(2) Daripada autoriti yang telah diputuskan, adalah jelas bahawa jika seorang merupakan pemegang amanah harta beliau beliau tidak bertanggungjawab kepada sebarang pihak untuk apa-apa faedah yang diperolehi semasa memegang wang itu di bawah amanah. Oleh kerana Rajan merupakan pemegang amanah harta bagi baki harga belian itu, beliau berhak menyimpan untuk dirinya sendiri apa-apa faedah yang diperolehinya atas jumlah itu. Berdasarkan apa yang tersebut dahulu, Jawatankuasa Tatatertib telah membuat kesilapan mengenai fakta dan undang-undang apabila membuat keputusan mereka mengenai soalan pertama itu.

(3) Adalah tidak dipertikaikan bahawa memorandum pindahmilik itu telah disempurnakan oleh penerima namaan pembeli hanya selepas baki harga belian itu diterima. Mengikut amalan pemindahhakan biasa, suatu memorandum pindahmilik tidak dihantarkan untuk pembatalan setem dan untuk disetemkan sehingga dan kecuali kesemua butir-butir belian yang diperlukan itu dilengkapi dan pembeli telah menyempurnakannya. Sebarang memorandum pindahmilik yang tidak mematuhi keperluan ini dianggap sebagai tidak lengkap dan mungkin ditolak oleh badan berkuasa yang berkenaan. Di bawah keadaan sedemikian, Rajan tidak mungkin menghantar memorandum pindahmilik itu untuk pembatalan setem sebaik sahaja perjanjian itu disempurnakan kerana memorandum itu mesti terlebih dahulu ditandatangani oleh pihak-pihak itu dan beliau tidak boleh dipersalahkan kerana lewat menghantar memorandum pindahmilik itu untuk pembatalan setem dan untuk disetemkan. Oleh itu, Jawatankuasa Tatatertib telah membuat kesilapan apabila membuat keputusan mereka mengenai soalan kedua.]

Notes

For cases on the duty owed by lawyers to their clients, see [1991] Mallal's Digest 1469–1471.

Cases referred to

1 *Toh Theam Hock v Kemajuan Perwira Management Corp Sdn Bhd* [1988] 1 MLJ 116 (folld)
2 *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426; [1971] 2 All ER 611; [1971] 2 WLR 930 (folld)
3 *Sorrell v Finch* [1977] AC 728 (folld)

Mohd Yaacob Karim (*GT Rajan & Co*) for the appellant.
N Pathmanathan (*Skrine & Co*) for the respondents.

James Foong J (delivering the grounds of judgment of the court): This is an appeal by way of a notice of motion by the appellant, Mr GT Rajan ('Rajan') against the decision made by the Disciplinary Committee dated 13 December 1991.

The facts of this case are as follows. The respondents were registered owners of a piece of land which they sold to two purchasers under a sale and

A purchase agreement dated 28 July 1989. Rajan was the solicitor for the respondents in this transaction. The purchasers were represented by their own solicitors Messrs Azam-Malek & Soh.

In cl 2 of the sale and purchase agreement it is stated that:

> Upon the execution of this Agreement the parties hereto shall simultaneously
> B execute a valid and registrable memorandum of transfer of the said Property in favour of the Purchasers or their nominee or nominees and the Vendor shall deliver to the Vendor's solicitors Messrs GT Rajan & Co all documents of title to the said Land for safe custody. The said solicitors are hereby duly authorized by the parties hereto to forthwith present the memorandum of transfer for adjudication and stamping thereof provided always that the said solicitors shall
> C receive the balance purchase price of Ringgit Seven Hundred and Fifty Thousand (RM750,000) only from the purchaser before presentation of the memorandum of transfer and upon registration of the same the said balance of the purchase price of Ringgit Seven Hundred and Fifty Thousand (RM750,000) only shall be paid to the Vendor forthwith.

D The balance of the purchase price under the sale and purchase agreement was to be paid within one year from the date of the sale and purchase agreement.

When the balance of the purchase price was paid by the purchasers to Rajan, the respondents requested that this amount be deposited into a fixed deposit interest earning account. Rajan was of the view that as he was a E stakeholder of the said money, he need not accede to the request of the respondents.

Eventually when the balance of the purchase price was released to the respondents some four months after Rajan had received the same from the purchasers, it was without any interest. This prompted the respondents to F complain to the State Bar Committee about the conduct of Rajan which ended up with an enquiry by the Disciplinary Committee appointed by the Chief Justice under s 99 of the Legal Profession Act 1976 before its amendment in 1992.

From the decision of the Disciplinary Committee, Rajan was alleged to have been guilty of 'conduct otherwise unbefitting an advocate and solicitor' G under s 93(2)(b) of the Legal Profession Act 1976 before its amendment in 1992.

During the hearing before the Disciplinary Committee, counsel for Rajan and the respondents agreed on three issues. They were:

H (1) During the whole transaction, was Rajan a solicitor for the respondents or a stakeholder?
(2) Was Rajan late in sending the memorandum of transfer for adjudication and stamping?
(3) Was the fee charged by Rajan on the respondents in respect of the transaction he handled for the respondents fair and reasonable?

I It is presumed that if the answers are in the positive to any of the questions posted aforesaid, then Rajan is guilty of the alleged charge, ie conduct unbefitting of an advocate and solicitor under s 93 of the Legal Profession Act 1976 before its amendment in 1992.

To the first question, the Disciplinary Committee answered in the positive. The Committee found that Rajan was the solicitor for the respondents in the transaction and as such, was an agent to the respondents and not a stakeholder. As an agent he was not entitled to the interest derived from the balance of the purchase price deposited with him for about four months.

In order to decide whether a person is an agent or a stakeholder, 'the circumstances of the transaction as a whole' must be examined (see the judgment of Hashim Yeop A Sani SCJ (as he then was) in *Toh Theam Hock v Kemajuan Perwira Management Corp Sdn Bhd*[1] at p 118.

It is without doubt that Rajan first appeared on the scene of this transaction as a solicitor acting for the respondents. In that capacity, he was an agent of the respondents. However, when the sale and purchase agreement was executed between the purchasers and the respondents, Rajan's role as an agent was somewhat transformed with an added duty and responsibility. The proviso in cl 2 of the sale and purchase agreement provides that Rajan shall receive the balance of the purchase price and not release the same until the registration of the transfer into the names of the purchasers, their nominee or nominees. This places a responsibility on Rajan to keep the said money in his own hands or to put it on deposit with a bank. In the event that registration of the transfer into the name of the purchasers or their nominee or nominees cannot be registered, he has to return the said sum to them. On the other hand, without the money being placed with him, the respondents as vendors would have refused to allow the release of the document of title and the memorandum of transfer to the purchasers. In the opinion of this court, Rajan was therefore placed in the position of a trustee where he was accountable to both the purchasers and the respondents. If he was an agent as submitted by the respondents' counsel, then he is not accountable to the purchasers but, as one can see, this is not the case. The terms in cl 2 are clear and they were inserted to protect the interests of both the parties to the agreement. In order to do so, Rajan in the opinion of this court, was clearly a stakeholder in this situation. Though the word 'stakeholder' is not expressly stated in the agreement, the circumstances are clear to imply that he was to play the role of such a character in this transaction.

From decided authorities, it is clear that if a person is a stakeholder then he is not accountable to any party for any interest gained while holding the money on trust. This point is clearly illustrated in the dissenting view of Lord Denning in *Burt v Claude Cousins & Co Ltd*[2] which was subsequently adopted by the House of Lords in *Sorrell v Finch*[3] and accepted by the Supreme Court in *Toh Theam Hock*'s case.[1] It reads as follows [at p 435]:

> If an estate agent or solicitor, being duly authorized in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v Trustee of Property of Reed (A Bankrupt)* [1967] Ch 1194 at p 1200; [1967] 2 All ER 1286 at p 1289, per Cross J. Until the event is known, it is his duty to keep it in his own hands: or to put it on deposit at the bank: in which case he is entitled to keep for himself any interest that accrues to it: see *Harington v*

A *Hoggart* (1830) 1 B & Ad 577. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v Kingsman* (1818) 1 B & Ald 683; *Hampden v Walsh* (1876) 1 QBD 189. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

B As this court has found that Rajan was a stakeholder of the balance of the purchase price received from the purchasers until subsequently released to the respondents, he is then entitled to keep for himself any interest earned on the said sum. Based on the aforesaid, this court finds that the Disciplinary Committee has erred in fact and in law in arriving at their finding on the first question.

C To the second question, the Disciplinary Committee also answered it in the positive. This issue arose from the fact that Rajan failed to 'forthwith present the memorandum of transfer for adjudication and stamping' after the execution of the sale and purchase agreement. It is a common practice in conveyancing of landed properties in this country to have the memorandum of transfer executed both by the vendor and purchaser D simultaneously with the sale and purchase agreement although the balance of the purchase price has yet to be paid. The executed memorandum of transfer is then forwarded to the relevant authorities for adjudication. This practice is adopted in view of a period of time taken by the government valuation department in assessing the value of the land in order to determine E the amount of stamp duty that is required to be paid for the transfer. By the time the balance of the purchase price is paid, which is normally an agreed period of three to four months from the date of agreement, the amount of stamp duty required to be paid on the transfer would have been made available. As soon as the stamp duty is paid, the memorandum of transfer together with the document of title to the land can then be presented for F transfer. This therefore saves a substantial amount of time as compared with the procedure of forwarding the memorandum of transfer for adjudication and stamping only when the balance of the purchase price is received. Primarily, the sole purpose of this exercise is to enable the vendor to collect his balance of the purchase price which, as in this case, depends G on the transfer of the said land being registered in the name of the purchasers.

Though cl 2 of the sale and purchase agreement in this case provides for such a procedure to be adopted, it was not being carried out. Instead, Rajan only forwarded the memorandum of transfer for adjudication and stamping after the balance of the purchase price was received by him from the purchasers. This eventually caused an approximate delay of four months H before the respondents could receive the balance of the purchase price.

Rajan in his reply to this allegation explained that he could not have forwarded the memorandum of transfer for adjudication and stamping because the purchasers had failed to nominate their nominee until the time when the balance of the purchase price was paid.

I In order to determine this issue, one must study the duties and obligations imposed upon Rajan under the sale and purchase agreement. Clause 2 of this agreement expressly authorized Rajan to 'forthwith present the memorandum of transfer for adjudication and stamping'. 'Forthwith' should

be read in conjunction with the earlier part of cl 2 which provides for the execution of the memorandum of transfer by the purchasers, their nominee or nominees. Unless this act, ie the execution of the memorandum of transfer had taken place first, Rajan could not forthwith forward the same document for adjudication and stamping. It is not a disputed fact that the memorandum of transfer was only executed by the purchasers' nominees after the balance of the purchase price was received.

Under such circumstances, how could Rajan possibly forward the memorandum of transfer for adjudication immediately after execution of the agreement? It must first be signed by the parties and then only forthwith sent for adjudication and stamping. Further, under normal conveyancing practice, a memorandum of transfer is not forwarded for adjudication and stamping until and unless all required particulars of the purchase are completed in the portion reserved for such purposes and the purchaser has executed the same. Any memorandum of transfer which does not fulfil this requirement is considered incomplete and is likely of being rejected by the relevant authorities. Upon these reasons, this court finds that Rajan cannot be blamed for sending the memorandum of transfer late for adjudication and stamping.

Based on the reasons stated above, this court again finds that the Disciplinary Committee has erred in arriving at their conclusion to Question No 2.

As for Question No 3, the Disciplinary Committee had dismissed the respondents' complaint and as such, it need not be considered by this court.

In view of the above, this court allows the appeal of Rajan against the decision of the Disciplinary Committee and set aside the orders so made thereunder with costs.

Wan Mohamed J: I concur.

Abdul Malek J: I concur.

Appeal allowed.

Reported by Anne Khoo